Supreme Court, U.S.
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(2)

No. 96-1009

In the Supreme Court of the United States

OCTOBER TERM, 1996

DAVID GOODHART AND HARVEY SHENBERG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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19 pp

QUESTIONS PRESENTED

1. Whether, at petitioners' trial for RICO conspiracy, the district court's jury instructions failed to ensure that the jury verdict was unanimous.

2. Whether a RICO conspiracy charge requires proof that the defendant agreed to commit personally at least two predicate acts of racketeering.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 89 F.3d 1461.

JURISDICTION

The judgment of the court of appeals (Pet. App. B3-B5) was entered on July 12, 1996. A petition for rehearing was denied on September 25, 1996. Pet. App. B1-B2. The petition for a writ of certiorari was filed on December 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, each petitioner was convicted on one count of conspiring to conduct and participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Petitioner Shenberg was also convicted of attempted extortion, in violation of 18 U.S.C. 1951. Shenberg was sentenced to 188 months' imprisonment, to be followed by a three-year term of supervised release. Petitioner Goodhart was sentenced to 97 months' imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed the convictions but vacated Shenberg's sentence and remanded for resentencing. Pet. App. A1-A58.

1. The evidence at trial showed that Roy T. Gelber, a judge of the Circuit Court of the Eleventh Judicial Circuit of Florida, accepted kickbacks in return for appointing attorneys as special assistant public defenders. Petitioner Shenberg, a judge on the county court, advised Gelber about the acceptance of kickbacks and other illegal schemes. Shenberg also arranged for Gelber to add one of Shenberg's former law partners to the list of attorneys who received court appointments in exchange for kickbacks. Thereafter, Shenberg periodically gave Gelber money on behalf of his former partner. Pet. App. A16-A17.

After learning of the kickback scheme, the government employed Raymond Takiff, a lawyer and friend of Gelber, to work undercover and to record conversations with Gelber and others suspected of corruption. In August 1989, Takiff, posing as a corrupt lawyer with ties to a fictitious South American drug

trafficker named "Peter," requested Gelber's assistance in influencing criminal cases pending against Peter's employees. Gelber accepted $11,000 from Takiff and gave Shenberg $5,000 to place in Shenberg's home safe. At Takiff's request, Gelber and Shenberg investigated the court file of one of Peter's employees to determine if he had cooperated with authorities in exchange for the dismissal of an attempted murder charge against him. Pet. App. A17-A18.

After the police seized property from the hotel room of one of Peter's employees, Takiff told Gelber that he wanted the property returned and information on the identity of the confidential informant. Gelber initially told Takiff that he could not assist him because he had sealed the warrant affidavit. Later, however, Gelber agreed to hear Takiff's motion to return property and to unseal the affidavit in anticipation of receiving a portion of the seized property as payment for granting the motion. Shenberg told Gelber he did not believe that the matter would raise any "red flags." Gelber then met with Takiff, intending to disclose the name of the informant, but changed his mind when he learned that Peter planned to have the informant killed. Shenberg subsequently disclosed the name of the informant to Takiff on the conditions that Peter not murder the informant for 45 days, that Peter pay Shenberg $50,000, and that Gelber receive a portion of the seized property. Shenberg eventually grew suspicious that Takiff was an informant and told Gelber that he would not resume his dealings with Takiff. Pet. App. A19-A21.

In September 1990, Circuit Judge Phillip Davis told Takiff that he, Gelber, and Shenberg intended to join up with Takiff to "make some money." Takiff

provided Davis with the names of four individuals and asked him to determine if there were outstanding warrants against them. After Davis informed Takiff that there were outstanding warrants against two of the individuals, Takiff asked Gelber to fix the warrants, one of which related to a case before Circuit Judge Arthur Snyder. Gelber conferred with Shenberg, who advised him that Circuit Judge Alfonso C. Sepe should approach Snyder on Takiff's behalf. Snyder refused to fix the warrant. Pet. App. A21.

In December 1990, Takiff asked Gelber to obtain low bail in a fictitious case filed by the state prosecutors against Peter's sister-in-law, Bonnie Carrillo, and her husband, Hector Penna, and dismissal of the charges through a motion to suppress. Shenberg cautioned Gelber about dealing with Takiff. Gelber nonetheless conferred with Sepe, who stated that he would have no problem complying with Takiff's request. The deal called for Sepe and Gelber to receive $200,000 for each defendant. After the deal was aborted, Sepe agreed to resume negotiations with Takiff on condition that petitioner Goodhart, a lawyer, receive the bribery payment. Thereafter, Takiff conducted all his dealings with the judges through Goodhart. Pet. App. A22-A23.

In February 1991, Takiff gave Goodhart $150,000 in cash. The following day, over the State's objection, Sepe released Carrillo on $50,000 bail. In April 1991, Sepe also granted Carrillo's motion to suppress, leading to the dismissal of the charges against her. In addition, Sepe agreed to find grounds to dismiss the indictment against Carrillo's husband, who also faced drug trafficking charges. A few weeks later, Sepe gave Gelber $50,000 in cash, $10,000 of which Gelber gave to Shenberg to place in Shenberg's safe. In May

1991, Goodhart unsuccessfully attempted to fix another case for Takiff. Pet. App. A23-A24.

On June 8, 1991, the government executed search warrants at the homes and offices of Gelber, Shenberg, Sepe, Goodhart, and Davis. They seized money matching the serial numbers of bribes paid to Gelber, Sepe, Shenberg, and Goodhart. Pet. App. A24.

2. The grand jury charged petitioners with one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and one count of conspiracy to violate the RICO Act, in violation of 18 U.S.C. 1962(d). The substantive racketeering count alleged that the defendants had conducted an enterprise through a pattern of racketeering consisting of 13 separate predicate acts of racketeering, and set forth those 13 predicate acts. Superseding Indictment 24-53. The substantive count also alleged that each of the 13 acts of racketeering were criminal offenses under several different theories, or subpredicate acts. *Ibid.* The RICO conspiracy count did not expressly incorporate the predicate acts and subpredicate acts listed in the RICO substantive count. Rather, the conspiracy count alleged that the conspirators agreed to engage in a pattern of racketeering activity consisting of multiple enumerated criminal offenses, alleged that the objective of the conspiracy was to use the circuit court corruptly to make money, and set forth numerous methods and means that the defendants anticipated employing to achieve the conspiracy's goal. *Id.* at 4-24.

3. At the conclusion of the trial, the defense requested a special verdict on the RICO counts requiring the jury to identify the specific predicate acts of

racketeering that each defendant committed. The district court granted the request for a special verdict on the substantive RICO count, but denied the request for the RICO conspiracy count. Pet. App. A26. In its final charge, the district court instructed the jury with respect to the RICO conspiracy count that, in order to find petitioners guilty, the jury was required to find (among other things) that petitioners agreed *either* to "personally participate in the commission of two predicate offenses," *or* that "other members of the conspiracy would commit two or more predicate offenses." 67 Tr. 11,965. The court further instructed the jury that, on the conspiracy count, it "must unanimously agree as to which two or more racketeering acts, that is, predicate offenses, if any, the defendant allegedly agreed to commit or would be committed." Pet. App. A34. The court added: "It would not be sufficient if some of the jurors found that the Defendant agreed to commit two of the racketeering acts or agreed that two such acts would be committed while the remaining jurors found that he agreed to commit two different racketeering acts or agreed that two different such acts would be committed." *Ibid.*

The jury returned verdicts of not guilty on several substantive counts and failed to reach a verdict on others, including the substantive RICO violation charged against both petitioners. The jury found both petitioners guilty of RICO conspiracy. Pet. App. A26.

4. On appeal, petitioners contended that the evidence was insufficient to support their convictions on the RICO conspiracy count because it fell short of showing that they agreed *either* personally to commit two predicate acts of racketeering *or* to have others commit two or more such acts. Shenberg C.A.

Br. 15; Goodhart C.A. Br. 39. Petitioners argued that, setting aside the predicate acts that corresponded to substantive counts on which they or their co-defendants were acquitted or on which the jury had failed to reach agreement, they were each subject to liability for only one predicate act. They did not, however, argue to the court of appeals that a RICO conspiracy charge requires proof that the defendant agreed personally to commit two acts of racketeering.

The court of appeals rejected petitioners' argument about the sufficiency of the evidence. The court observed that the acquittals on the substantive counts had no bearing on the sufficiency of the evidence supporting the RICO conspiracy convictions. The court explained that the acquittals could have been the result of mistake or lenity. Pet. App. A30. The court then stated that a defendant's participation in a RICO conspiracy may be established in either of two ways: by showing that the defendant agreed to the overall objective of the conspiracy, or by showing that he personally committed two predicate acts. *Id.* at A30-A31. The court concluded that the evidence was sufficient to support the RICO conspiracy convictions of both petitioners under either theory. *Id.* at A31-A32.

Petitioner Goodhart also contended that the use of a general verdict on the conspiracy count improperly permitted the jury to find him guilty of conspiracy without reaching unanimous agreement on the specific predicate acts that he had agreed to commit or have committed. Goodhart C.A. Br. 9. The court of appeals rejected that contention as well. The court of appeals noted that the trial court had charged the jury that, to find a defendant guilty of conspiracy, the jury was required to reach unanimous agreement on

the specific predicate acts that the defendant had agreed to commit or have committed. Pet. App. A34-A35. Since, the court of appeals noted, a jury is presumed to follow its instructions, it found no abuse of discretion in the district court's refusal to require a special verdict on the conspiracy count. *Ibid.*

DISCUSSION

1. Petitioners contend (Pet. 9-19) that the jury should have been instructed that, to find petitioners guilty of RICO conspiracy, it was required to reach unanimous agreement not only on the predicate acts of racketeering that each petitioner agreed to commit or have committed, but also on the specific sub-predicate acts alleged in the substantive RICO count. That contention lacks merit.

a. Section 1962(d) of 18 U.S.C. makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The gist of that offense, as with any conspiracy offense, is the agreement to violate the law—here, one of RICO's substantive provisions. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *United States* v. *Shabani*, 513 U.S. 10, 16 (1994) (quoting *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975)). To prove a RICO conspiracy to violate Section 1962(c), the government must show that the defendant *agreed* to conduct or participate in the conduct of an enterprise through a pattern of racketeering activity. The government need not show that any particular acts of racketeering activity occurred. That is because Section 1962(d) "centers on the act of agreement, which makes unnecessary—and in many cases impossible—the identification in the indictment of specific predi-

cate acts that have come to fruition." *United States* v. *Glecier*, 923 F.2d 496, 501 (7th Cir. 1990), cert. denied, 502 U.S. 810 (1991); see *United States* v. *Phillips*, 874 F.2d 123, 128 (3d Cir. 1989) (approving instruction that the jury must find "that each defendant knowingly and willfully agreed to join a conspiracy with knowledge of its goals and knowledge that at least two acts of racketeering of the type described in the indictment (*i.e.*, bribery under state law and extortion under federal law) would be performed by some member[s] of the conspiracy").

Because the RICO conspiracy offense is complete upon the defendant's joining the conspiracy to violate a substantive RICO provision, it is not an element of the offense that the conspirators actually carry out any two particular predicate acts or that they agree that any two particular acts would be committed. And because proof of particular predicate acts is not an element of the offense, no instruction that the jury must be unanimous about such predicates is required. The commission of specific predicate acts (or proof of agreement to commit specific predicate acts) may have evidentiary weight in persuading the jury that the defendant entered into an agreement to violate a substantive provision of RICO. But the jury need not agree unanimously on which items of evidence persuaded each juror that the conspiratorial agreement was reached. As this Court has stated in a related context:

> In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that

> the jury reach agreement on the preliminary factual issues which underlie the verdict."

Schad v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion) (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)); accord *Schad*, 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment).

b. Even if the Sixth Amendment required that jurors in a RICO conspiracy case unanimously agree on the specific predicate acts that the conspirators agreed to have committed, that rule would not help petitioners in this case. Petitioners received such an instruction. As petitioners acknowledge (Pet. 15), the district court in this case expressly instructed the jury that it had to reach unanimous agreement as to the racketeering acts attributable to petitioners in order to return a guilty verdict on the conspiracy charge. Pet. App. A34 (quoting unanimity instruction on the RICO conspiracy count). No more is required, even under petitioners' theory.

Petitioners argue that an additional instruction was required in this case to inform the jury that it had to reach unanimous agreement on the particular sub-predicate act constituting each act of racketeering charged in the *substantive* RICO count. That argument rests on the fact that the indictment's substantive RICO count alleged a pattern of racketeering acts, each of which consisted of sub-predicate acts involving different legal theories of how a particular act of bribery or extortion violated state or federal law. Although the indictment's conspiracy count did not incorporate or refer to the substantive count's allegations of predicate acts, petitioners suggest that, under the court's instructions, the jury

would have referred to the definitions of the predicate offenses in the RICO substantive count and then might have reached unanimous agreement on which two predicate offenses to attribute to a defendant without reaching unanimous agreement on the particular sub-predicate act.

It is unlikely that the instructions actually given in this case would have led to such a result. The instructions on the substantive RICO count required the jury to be unanimous not only about the particular predicate act, but also about the particular sub-predicate act that each defendant committed. The instructions stated:

> [A]s to each racketeering act itself, you must unanimously agree as to how, if at all, a Defendant committed the act. This is so because each racketeering act is made up of more than one distinct crime. * * *
>
> [Y]ou cannot find that a Defendant committed a particular racketeering act if some of you think that he committed that act by engaging only in crime A and the rest of you think that he committed that act by engaging only in crime B. There must be one crime within each racketeering act that all of you believe the Defendant committed in order for you to find that the Defendant committed that racketeering act.

67 Tr. 11,973-11,974. Thus, a jury that followed the conspiracy count's cross-reference to the substantive count's definition of predicate acts would have logically concluded that it was required to be unanimous as to particular sub-predicates in order to find the existence of a valid predicate act.

Even if that interpretation of the jury instructions is incorrect, however, petitioners' rights were nonetheless not violated. "It has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Schad*, 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment). The predicate acts charged in the substantive RICO count grouped various sub-predicate crimes together because each predicate act concerned a particular episode of bribery, extortion, or other crime, and all of the sub-predicate acts were factually related. So long as the jury agreed on the defendants' participation in a particular criminal episode, the jury was not constitutionally required to reach unanimity on the particular "mode of commission." *Ibid.*[*]

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[*] Petitioners cite (Pet. 13-14) several cases in which the courts of appeals have arrived at varying conclusions on the extent to which the Sixth Amendment requires jury unanimity on the facts underlying the elements of certain offenses. None of those cases, however, involved a RICO conspiracy conviction. See *United States* v. *Hall*, 93 F.3d 126 (4th Cir. 1996) (continuing criminal enterprise), cert. denied 117 S. Ct. 1087 (1997); *United States* v. *Edmonds*, 80 F.3d 810 (3d Cir.) (en banc) (same), cert. denied, 117 S. Ct. 295 (1996); *United States* v. *Anderson*, 39 F.3d 331 (1994) (same), reh'g granted in part on other grounds (D.C. Cir.), 59 F.3d 1323, cert. denied, 116 S. Ct. 542 (1996); *United States* v. *Canino*, 949 F.2d 928 (7th Cir. 1991) (same), cert. denied, 504 U.S. 910 (1992); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989) (same), cert. denied, 497 U.S. 1003 (1990); *United States* v. *Echeverri*, 854 F.2d 638 (3d Cir. 1988) (same); *United States* v. *North*, 910 F.2d 843 (D.C. Cir. 1990) (destruction of government property), cert. denied, 500 U.S. 941 (1991); *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988) (false tax return); *United States* v. *Puerta*, 38 F.3d 34 (1st Cir. 1994) (bank fraud), cert. denied, 115 S. Ct. 1797 (1995); *United States* v.

2. Petitioners contend (Pet. 20-25) that the district court incorrectly instructed the jury that it could find them guilty on the RICO conspiracy count without finding that they agreed personally to commit two predicate acts of racketeering. The district court instructed the jury that, to find petitioners guilty of RICO conspiracy, it was required to find that they agreed *either* to "personally participate in the commission of two predicate offenses," *or* that "other members of the conspiracy would commit two or more predicate offenses." 67 Tr. 11,965. The question whether the RICO conspiracy statute requires proof that the defendant agreed personally to commit two racketeering acts is currently before the Court in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997).

In the court of appeals, petitioners did not raise any challenge to the instruction given by the district court. Petitioner Shenberg stated that, "in order to prove the crime of RICO conspiracy, the government was required to prove that each defendant *either* agreed to personally commit 2 RICO acts *or* agreed to have 2 such acts committed by others." Shenberg C.A. Br. 39 (emphasis added). Petitioner Goodhart, in challenging the sufficiency of the evidence to support the conspiracy conviction, argued that the government "failed to prove that [he] agreed to commit *or have committed* at least two racketeering acts."

Beros, 833 F.2d 455 (3d Cir. 1987) (embezzlement); *United States* v. *Holley*, 942 F.2d 916 (5th Cir. 1991) (perjury), cert. denied, 510 U.S. 821 (1993). And, equally importantly, none involved the type of unanimity instruction given in this case. Accordingly, any disagreement reflected in those cases on the proper role of unanimity instructions is not properly presented here.

Goodhart C.A. Br. 15 (emphasis added); see also Goodhart C.A. Reply Br. 20 ("the government must prove that each RICO defendant agreed to either personally commit or have committed by others at least two predicate acts"). The court of appeals reaffirmed its previous ruling that, under the RICO conspiracy statute, "it is 'not necessary that the defendant agree to personally commit two predicate acts,'" Pet. App. A31, and it concluded that the evidence was sufficient to support petitioners' conspiracy convictions because both petitioners had "committed or agreed to have others commit at least two predicate acts," *id.* at A32.

Although petitioners failed to present on appeal a challenge to the district court's jury instruction on RICO conspiracy, the court of appeals passed on the second issue presented in their certiorari petition, which is currently before the Court in *Salinas*. Accordingly, the petition should be held for the decision of the Court in *Salinas*, and then disposed of as appropriate in light of that decision. If the Court holds in *Salinas* that the RICO conspiracy statute requires proof that the defendant agreed to commit personally two predicate acts of racketeering, the court of appeals will be free to consider on remand whether petitioners waived their argument on that point by their failure to present it on their appeal.

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be denied. As to the second question presented, the petition for a writ of certiorari should be held for the decision of the Court in *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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APRIL 1997